



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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No. 1034

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GEORGE F. DRISCOLL COMPANY, A CORPORATION,  
*Petitioner,*  
*vs.*

THE UNITED STATES,  
*Respondent*

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
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**I. Statement of the Case**

A statement of the facts and questions involved will be found in the petition for writ of certiorari.

**II. Specification of Errors**

The Court of Claims of the United States erred:

1. In denying recovery to petitioner under the facts and circumstances of this case;
2. In failing to hold that under the facts and circumstances of this case the questions raised as a result of the breaking of the water main were for the determination of the court below and not for the contracting officer;

3. In determining that the decision of the contracting officer was final and conclusive as to questions of law;
4. In failing to hold that petitioner was not bound by the decision of the government's construction engineer;
5. In failing to enter judgment for the petitioner in view of the fact that four judges determined petitioner was not guilty of any negligence and three judges, in effect, held that under the facts and circumstances of this case the contracting officer had no jurisdiction to determine the question of who was liable to respond in damages as a result of the breaking of the water main.

### III. Argument

The questions involved in this case cannot be better argued or presented than they are in the two dissenting opinions filed in the court below. As was said by Judge Whitaker, the work of repairing the broken water main was not a part of petitioner's contract for the construction of certain buildings on Ellis Island and, hence, it was not governed by its terms; and the provisions of Article 15 of the contract between petitioner and respondent had no application to the dispute as to who should pay for the cost of repairing the broken water main.

It should be borne in mind that there was no dispute in this case until the question of who was to pay for the damage to government property arose.

Let us assume that petitioner, following the breaking of the water main, had refused to repair it and the government had repaired it at its own expense. No one would contend that the contractor's refusal to repair the main resulted in a breach of its contract to build certain buildings on Ellis Island. In order to recover the expense incident to repairing the main the government would have

had to sue the petitioner in a court of law for damages on the ground that it negligently broke the main. Petitioner would have denied negligence, and the case would have been tried as any other negligence case irrespective of what attempts the contracting officer had made to decide the issue.

If, in the event the contractor had refused to make the repairs, the government had withheld from the contract price its cost in making the repairs, the contractor would have sued in the Court of Claims for monies due under its contract, and the government would have had to file a counterclaim or setoff for the cost of the repairs. The contractor would, of course, have denied negligence, and the burden of proving it would have been on the government.

As was clearly pointed out in the dissenting opinion of Judge Madden, the issue between the parties following the break of the government water main was whether petitioner's breaking of the main was negligent or tortious and, if so, whether the concurrence of the government's agent in the petitioner's conduct was such as to prevent the government from recovering its loss from the petitioner. In other words, was there contributory negligence or was the government estopped to deny liability because of its acquiescence in everything that was done? It should be remembered that the new location of the main was selected by the government's engineer, that the probing was done in his presence, and that following the probing permission was given to drive the pile and the pile was driven in the presence of the government's assistant construction engineer.

In the opinions below some confusion seems to exist as to whether the decision of the construction engineer or that of the Director of Procurement constituted the decision of

the contracting officer. However, it makes very little difference. The government's Construction Engineer did not decide the question of negligence nor did the head of the Procurement Division. The former decided that certain provisions of the specifications had not been followed and that if they had been the damage to the water main would not have occurred. He does not specify in what respect or in what particulars petitioner failed to comply with those paragraphs of the specifications. The court below did not find as a fact that petitioner failed to comply with any of them.

Although he is designated as such by the opinion of Judge Littleton, there is no finding that the Director of Procurement was the contracting officer, nor is there any finding that the Director of Procurement was not the duly authorized representative of the Secretary of the Treasury. Regardless of this, there is no finding as to the basis for his conclusion that the contractor must assume the additional expense incurred in the repair of the main.

A reading of those paragraphs of the specifications referred to by the construction engineer in his decision shows clearly that none of them had any application to the situation that confronted petitioner and the government's engineers just prior to the driving of the pile and after the breaking of the main (See R. 22-24). Judge Madden construed the opinions of the government representatives to mean that the specifications required petitioner to keep the water running through the water main regardless of what happened to it (see paragraph 987 of the Specifications, R. 23) and therefore petitioner, in repairing the main, did no more than was required of it by the contract (R. 37).

The only paragraph of the specifications that could possibly have any bearing is paragraph 987 (R. 23). That provision provided that petitioner was to maintain water

service to the existing buildings on the island during the course of construction. As Judge Madden says, however, the contract provision concerning the maintenance of the water service had nothing to do with the questions involved in this case.

The absurdity of construing paragraph 987 of the specifications to mean that petitioner was to supply water to Ellis Island at its own expense after the breaking of the main is apparent when a hypothetical case is considered. Let us assume that the water main was broken by some third party at a point in the bottom of the river between the island and the Jersey shore. It is submitted that even the contracting officer by any stretch of his imagination could not have decided that petitioner had to go, at its own expense, into the river, find the break, repair it and, at the same time, supply water by tugboat to the island.

In any event, the question of the interpretation of the specifications as applied to the situation existing on Ellis Island May 1, 1935 is purely a legal one and not one for the determination of the contracting officer.

In the opinion of Judge Littleton filed in this case he says that the contracting officer decided that petitioner and not the government was responsible for locating the water main before driving the pile which resulted in its being broken, and that the Court of Claims was bound by that decision. The finding is that the construction engineer suggested that that be done, that the contractor objected, and that the government engineer then directed that another procedure be followed (R. 26). There is no finding of fact to support the conclusion of Judge Littleton. In any event, assuming that the conclusion reached by Judge Littleton is correct as to the basis of the contracting officer's decision, the interpretation of the contract so as to determine the responsibility of either party to respond in damages presents a legal question

which, it is submitted, cannot be for the decision of the contracting officer or the head of the department concerned.

#### **IV. Conclusion**

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in that the questions here involved may be permanently settled by this Court and a proper construction and interpretation made of Article 15 of the Standard United States Form of Government Contract, and that the confusion existing now in the minds of contractors, government departments, and the judges of the court below be cleared up; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Court of Claims of the United States and finally reverse it.

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